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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. ~~811~~ 80

THOMAS HODGE, GEORGE HODGE, NETTIE POWELL, ANNA LEASE AND AGNES CRIPPEN,
Petitioners,

vs.

FIRST PRESBYTERIAN CHURCH OF STERLING, ILLINOIS,
Respondent.

BRIEF OF RESPONDENT IN ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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OPINION BELOW.

The opinion of the Supreme Court of Iowa (R. 31) is reported as *In Re Barrie's Estate*, Iowa, 35 N. W. 2d 658.

STATEMENT OF CASE.

We adopt the petitioners' statement of the case but must add thereto the following:

The Iowa Code of 1946 Sec. 604.3 provides that the District Court of each County in Iowa shall have original and exclusive jurisdiction to probate the Wills of non-residents

of the State who have died leaving property within the State subject to administration; and that subsequent to the denial of probate of the Will of Mary E. Barrie by the Supreme Court of Illinois, the Appellate Court of the Second Appellate District of Illinois held that it was permissible to remove the original Will from the files of the Probate Court of Illinois "for the purpose" of presenting to the Iowa Court for probate. This is reported *In re Estate of Mary Barrie,* 311 Ill. App. 443, 73 N. E. 2d 654 (R. 18).

SUMMARY OF THE ARGUMENT.

In answering the arguments contained in the supporting brief, we propose to show that:

(1) The full faith and credit clause of the United States Constitution is not involved inasmuch as

a. The Illinois Supreme Court did not attempt to pass upon and had no jurisdiction to pass upon the question of whether the acts of the testator which amounted to a revocation in Illinois also constituted a revocation of the Will in Iowa which has a much different statute.

b. The full faith and credit clause only requires a sister State to give such force and effect to a decision as the Court of the first State gave to it.

c. If the full faith and credit clause were to be considered applicable to the decision as to the effect of the acts constituting revocation in Illinois, it would follow that full faith and credit should be given to the decision of the Appellate Court (R. 18) that it was proper to remove the original Will from the Court files of Illinois for the purpose of presenting the Will for probate in the State of Iowa.

(2) The doctrine of *res judicata* does not apply because the question before the Iowa Supreme Court (R. 31) was not that passed upon by the Illinois Supreme Court (R. 6) inasmuch as the question passed upon by the Iowa Court was whether the action of the testator constituted a revocation in Iowa within the terms of the Iowa Code. The Illinois Supreme Court only passed upon the effect of the acts of the testator as amounting to a revocation in Illinois under the Illinois statute.

(3) The Federal questions passed upon by the Iowa

Supreme Court were not in any sense new in principle and were decided in conformity with principles frequently enunciated by this Court, one of which is that the construction of a State statute will be left to the Supreme Court of that State, and another is that a judgment of a State Court is entitled to only such full faith and credit in other States as it has by the law and usage of the State in which it was rendered.

ARGUMENT.

I.

The Law of the Situs of the Property Governs as to Whether or Not a Person Died Testate or Intestate Insofar as Real Estate Is Concerned.

It is well settled that the validity and effect of a Will which passes title to an interest in land is determined by the law of the State where the land is. (Restatement of the Law, Conflict of Laws, Sec. 249) and that "The effectiveness of an intended revocation of a Will of an interest in land is determined by the law of the State where the land is." (Restatement of the Law, Conflict of Laws, Sec. 250.)

A fundamental principle of jurisprudence as deduced from English common law is that title to land passes only by the *lex re sitae*. *Darby* v. *Mayer*, 10 Wheat. 465, 6 L. Ed. 367; *McCormick* v. *Sullivant*, 10 Wheat. 192, 6 L. Ed. 300; *Robertson* v. *Pickrell*, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049; *Vogel* v. *New York Life Insurance Company*, 55 F. (2d) 205, writ of certiorari denied in 1932; 287 U. S. 604, 77 L. Ed. 525, 53 Sup. Ct. 9.

In commenting on these and numerous other cases, 131 A. L. R. Page 1026 states:

> "Subject to statutory provision to the contrary, expressed or by construction and a few cases to the contrary, some of which are explainable on statutory grounds, it may be stated generally that the great weight of authority favors the rule that a judgment or decree of a Court of decedent's domicile passing (expressly or by implication from admission to probate) upon the validity or construction of his Will, devising real property in another state, is not conclusive as to

> the question, so far as it concerns such real property in the courts of the other state, either upon parties or nonparties to the proceedings in which the judgment of the former state is rendered, whether considered under the full faith and credit provision or the doctrine of *res adjudicata* or estoppel by judgment or upon general grounds as to conclusiveness of judgments."

In the present instance, the Courts of Illinois *In Re Will of Mary E. Barrie,* 311 Ill. App. 443, 447; 73 N. E. 2d 654 (R. 18) in considering the question of whether or not the Will should be withdrawn from the Courts in Illinois for the purpose of admitting the same to probate in Iowa gave the following interpretation as to the effect of the Illinois decision denying probate of the Will in Illinois. "The title to and disposition of real estate either by deed or will is governed by the law of the State where the land is situated. Mary E. Barrie owned real estate located in Iowa, and the disposition of this real estate is governed by the laws of that State. Any order denying that will admission to probate in Illinois does not effect the title of her real estate located in the other state." The Iowa Supreme Court did not act contrary to this statement.

Let us now consider the authorities submitted by petitioner in his supporting brief as opposing the above well established principles. It is first noted that the case of *Davis* v. *Upson,* 230 Ill. 327, 82 N. E. Rep. 824 (Br. p. 8) is not in point in the present case as that case emphasizes that there was no land or other real estate located in the State of Illinois upon which to predicate jurisdiction of the Illinois Courts to admit the Will to probate. In this regard, the true status of the Illinois law on the question involved in our case is shown by the opinion in *Sterenberg, et al.* v. *St. Louis Union Trust Company,* 394 Ill. 452, 68 N. E. 2d 892, in which case, it appears that decedent died domiciled in the State of Missouri where his Will was admitted to

probate. It was held by the Illinois Court that the proceeding admitting the Will to probate in Missouri was invalid insofar as the real property in Illinois was concerned due to the fact that the Will had been revoked by the marriage of the testator subsequent to the execution of the Will. Note the statement in this case in 68 N. E. 2d on Page 895 as follows:

"The rule is established in this State and, we believe, in all States that the validity and construction, as well as the force and effect of all instruments affecting the title to land depend upon the laws of the State or Country where the land is situated." Iowa has recognized this rule so well stated by the Illinois Supreme Court.

The case of *Gailey* v. *Brown*, 169 Wis. 444, 171 N. W. 945, cited in petitioner's brief (Br. p. 8) has no bearing upon the present case as that was strictly a case of interpretation of a Wisconsin statute which is in no way involved in the Barrie case.

The case of *Rackemann* v. *Taylor*, 204 Mass. 394, 90 N. E. 552, (Br. p. 10) involved personal property only so is not applicable to the present case and furthermore in that case the Court did not hold that the Massachusetts Court which was not the court of domicile did not have power to first probate the Will, but simply held that as a matter of discretion, it would be well in regard to all of the considerations affecting the rights and interests of the parties to deny the probate at that time. It did, however, leave the way open for probate of the Will in question at a later date if conditions should warrant it. The cases of *Patterson* v. *Dickinson*, 193 Fed. 328 (Br. p. 11) and *In Re Randall Estate*, 113 Pac. (2d Ed.) 54, (Br. p. 11) are not applicable to the present case because they involve situations where the Will was admitted in a State other than the domicile upon presentation of an authenticated copy of the probate

in the domicillary estate, and then at a later date, the court of domicile overruled the original probate in that state, so naturally all proceedings based upon that original probate, by authenticated copy or otherwise, failed. This clearly is an entirely different question than is involved in this Barrie case.

We submit to the Court that Page on Wills, Sec. 572, (Br. p. 9) has been so seriously misquoted in petitioners' brief that it is necessary to correctly cite the paragraph to which the petitioner apparently had reference which is as follows:

> "As between different states or nations, jurisdiction to admit to probate the will of a decedent depends upon his domicile at the time of his death or upon the location of his property at that time, or both. The theory of many states in which common law is in force is that the state within whose territorial limits the testator was domiciled at the time of his death may admit his will to probate, even though the will was made in another state or testator was domiciled in such other state when the will was there made or testator dies in some other state. It has been said that as a rule, the will should first be submitted for probate at the domicile of the testator."

We hardly feel it necessary to point out to the Court that the omission of the words "or upon the location of his property at that time, or both" from the first sentence seriously impairs the meaning of the citation and also that it was entirely incorrect to state that this citation said "It is universally held by all Courts that the will should first be admitted for probate at the domicile of the testator."

The citations in Story on Conflict of Law, 7th Edition, (Br. pp. 9-10) as given by petitioner in his brief are inapplicable because those discussions are restricted to Wills of personal estate. The majority opinion of the Supreme Court of Iowa, not disagreed with by the minority opinion,

correctly quotes the stand of Story Conflicts of Law, 8th Edition, in regard to this doctrine when it quotes from Page 652 in Story, the following with relation to real immovable property:

> "The doctrine is clearly established at the common law that the law of the place where the property (speaking of real [immovable] property) is located is to govern as to capacity or incapacity of the testator, the forms and the solemnities to give the will or testament its due attestation and effect." (R. 33.)

Petitioner's references to Redfield on Wills, 4th Ed., Vol. 1, Pages 403, 406, 410 (Br. p. 11) is particularly inept in that it is not a quotation but a summary of that part of Redfield's discussion on foreign Wills which pertains to Wills regarding personal property. We call the Court's attention to the following direct citations from Redfield on Wills, 4th Ed., Vol 1, page 398:

> "It is scarcely necessary to state, that in regard to real property, the mode of execution, the construction, and the validity of a will must be governed, exclusively by *lex re sitae.*
>
> The descent of real estate, as well as the devise of it, is governed exclusively by the law of the place where the property is situated. It would not comport with the dignity, the independence, or the security of any independent state or nation, that these incidents should be liable to be affected, in any manner, by the legislation, or the decisions of the courts, of any state or nation besides itself. This has been a universally recognized rule of the English law from the earliest time, and is so unquestionable, that we would scarcely feel justified in occupying much space or reviewing the cases."

See also the further statement in Redfield on Page 409, 4th Ed., Vol. 1:

> "And the decision of the courts or the place of domicile of the testator, as to the validity, or revocation, of

a will personalty, are held conclusive upon all other courts, but not so as to realty, not within that jurisdiction."

It should be clear from the foregoing citations that all of the text books cited in petitioner's brief actually support the proposition that the law of the situs and not the law of the domicile governs as to real property outside of the state of domicile.

II.

The Full Faith and Credit Provision of the Constitution of the United States Is Not Violated in Any Manner by the Decision In Re Mary E. Barrie Estate.

The question of the application of the full faith and credit provision in a situation such as is involved in this case is clearly considered in 131 A. L. R. 1003 which states "although there is some authority to the contrary, the weight of authority holds that the full faith and credit provision does not render foreign decrees of probate conclusive as to the validity of a Will, as respects real estate situated in a State other than the one in which the decree was rendered because (1) the foreign Court has no jurisdiction or power to pass upon the title of the real estate not found within its territorial limits, and the constitutional provision presupposes a judgment or decree rendered by a Court of competent jurisdiction; and (2) the decree of probate has no effect even in that State upon the title to real estate elsewhere, and a constitutional provision does not require the giving of foreign judgments greater effect than they have at home." Numerous decisions can be cited in support of the foregoing proposition and for the purpose of the present case it seems sufficient to point out that the principles involved in above quotation were supported by the case of *Robertson* v. *Pickrell*, 109 U. S. 608, 27 L. Ed. 1049, 3 Sup.

Ct. 407, so that the issues have been passed on by the Supreme Court of the United States prior to this time and to further point out that both the Illinois Court and the Iowa Court in the present case have fully comprehended these principles it should be noted that the Appellate Court of the Second District *In re Estate of Mary E. Barrie, Deceased,* 311 Ill. App. 443, 447, 73 N. E. 2d 654 expressly limited the scope of the decisions as to the probate of the Will in the State of Illinois (R. 21). Therefore, since the Illinois Courts did not presume to have jurisdiction over the real estate in Iowa and did not presume to make any finding as to the validity of the Will in Iowa, it seems inconceivable that any question of full faith and credit could arise in regard to the Iowa Court's right to admit the Will in question to probate.

In regard to the appellant's citations in support of Section No. 2 of his brief, we have no argument with the general principles of full faith and credit as set down in the cases cited, however, as our argument has indicated they are not applicable to the present case. An examination of the citations in this Section of petitioner's brief discloses that they are in regard to factual situations far removed from the situation in this case and have no bearing on this case other than as general statements of principle.

We can do no better on this subject than to adopt by reference the appropriate portion of the opinion of the Iowa Supreme Court starting on page 34 of the printed record and ending at the top of page 37. The first paragraph is as follows:

> "Does a different rule pertain where instead of being admitted to probate in the domicile state, probate is denied? We think not. It is generally held that the full faith and credit provision of the Federal Constitution, Section 1, Article 4, does not render foreign decrees of probate conclusive as to the validity of a Will,

as respects real property situated in a State other than the one in which the decree was rendered, nor does the doctrine of *res adjudicata* or estoppel by judgment apply. *Robertson* v. *Pickrell*, 109 U. S. 608, 27 L. 3d 1049, 3 S. Ct. 407, where the Court said the probate established nothing beyond the validity of the Will in that State, and while conclusive there, the full faith and credit clause and the act of Congress enacted pursuant thereto, did not require that they shall have any greater force and efficacy in other courts than in the courts of the State from which they were taken, but *only such faith and credit as by law and usage they had there. Dibble* v. *Winter*, 247 Ill. 243, 93 N. E. 145; *Norris* v. *Loyd* (Iowa), *supra; M'Cormick* v. *Sullivant*, 10 Wheat. (U. S.) 192, 6 L. Ed. 300."

III.

The Doctrine of Res Judicata Has No Application to the Decision of the Supreme Court of Iowa in This Case.

It is obvious that as to findings of fact such as were made by the Supreme Court of Illinois in regard to whether or not Mary Barrie wrote upon her Last Will and Testament with intent to revoke the same, the decision of the Illinois Court is binding upon the Courts of Iowa and the facts so found between the parties are *res judicata*. This, however, has no bearing on the outcome of the present case because admitting the facts to be settled by a decision of the Supreme Court of Illinois, the decision of the Supreme Court of Iowa is perfectly consistent with such finding of fact.

It is also obvious that the decisions of law of the two Courts are entirely compatible. Our previous discussion of the principles involved in the giving of full faith and credit is also applicable to the question of *res judicata*.

It is a principle of law so well known as to negate the necessity of further discussion here that in order to be

res judicata the same exact issue must be involved in the prior suit as is involved in the second suit, and since it is obvious that the issue in the Court of Illinois was whether or not the Will of Mary Barrie had been revoked according to the Statutes of Illinois and the question involved in Iowa was whether or not the Will of Mary Barrie had been revoked in accordance with the Statutes of Iowa, there can be no possible application of *res judicata* in this case.

The Illinois Courts recognized their jurisdictional limitation over real property and decided only the question of whether the Will of Mary Barrie was entitled to probate as to personal property and her real estate located in the State of Illinois. Contrary to the petitioner's statement (Br. p. 17); the Courts of Illinois never decided that the instrument in question was not a Will or that Mary E. Barrie died intestate. The only issue decided by the Supreme Court of Illinois was that "The cause is remanded to the County Court with directions to enter an order refusing to admit the Will to probate" (R. 16). It is significant that the court even used the term "will". The Supreme Court of Iowa in the present case recognized the limitations on its jurisdiction and decided only the question of whether the Will of Mary Barrie was entitled to probate as to the real property located in Iowa. It would seem that this was in accord with the general principles laid down in the case of *Yonley* v. *Lavender* 21 Wall. 276, 22 U. S. S. Ct. Rep. Page 536, to the effect that the several States of the Union necessarily have full control over the estate of deceased persons within their respective limits.

It is therefore obvious that both the Iowa Court and the Illinois Courts have done nothing more than interpret their own probate Statutes as each has expressly recognized the other's right to do so. This, therefore, being a matter of statutory interpretation, the highest Courts of the State having spoken and no question of the constitutionality of

the Statute having been raised in this matter, it does not seem that the Supreme Court of the United States should interfere with the decisions below. *Sioux City Terminal Railroad and Warehouse Co.* v. *Trust Company of North America,* 173 U. S. 99, 19 Sup. Ct. 341, 43 L. Ed. 628.

In this regard it should be noted that the split in the Iowa Court's opinion below was predicated upon the interpretation of the Iowa Statute and not upon the common law or any constitutional questions involved. Notice dissenting opinion (R. 43), second paragraph and again on (R. 46) where discussion by the minority of the Iowa Court indicates they recognized the common law but felt their statute had changed it. The minority opinion distinguished the Florida and other cases because "they refer to no such statutory provision as ours" (R. 43). The majority opinion emphasized that the Iowa legislature could have included a provision in the Code to cover this situation but failed to do so (R. 37). The minority opinion in attempting to include a provision by implication stated (R. 44) that such omission of the Iowa legislature was "unthinkable". But the Iowa legislature was wise to avoid adopting the archaic rule of Illinois as to revocation, as applicable to land in Iowa. Its own rule as to revocation is practical and sensible.

IV.

The Federal Questions Which Petitioner Attempts to Raise in His Brief Have All Been Previously Adjudicated by the Supreme Court of the United States.

A close analysis of the case of *Robertson* v. *Pickrel,* 109 U. S. 208, 27 L. Ed. 1049, 3 Sup. Ct. 407 indicates that each Federal question raised by petitioner in his brief has been heretofore completely considered and decided upon by the Supreme Court of the United States, and that the decision

of the Supreme Court of the State of Iowa in the present case was in accordance with such Supreme Court decisions.

Conclusion.

After consideration of the numerous quotations and their application or lack of application to the points involved, we must come back to the fact that the document in question was in the first instance a Will. Then did it ever cease to be a Will? The Illinois Supreme Court held that because of the acts of the testator the document became revoked as to property in Illinois and so denied it to probate. This decision controlled all of the personal property of the decedent wherever located and the real estate in Illinois. It did not have any further effect whatever. The document still existed in the form in which it was originally executed, although there were later placed upon it certain writings and markings. The Illinois Supreme Court continued to refer to it as a "Will" in its ruling.

This document was then offered for probate in the State of Iowa. The Iowa Court had before it the question of whether it was a valid and subsisting Will to effect real estate in Iowa. The Iowa Statute permits the presentation of the Will of a deceased testator of other States provided the testator owned real estate in Iowa at the time of his death. The Iowa Court then had before it the question of whether the Will had been revoked in accordance with any provision of the Iowa Code. It held it had not been so revoked and so was effective in Iowa.

The Iowa Court then had to consider whether the judgment in Illinois was *res judicata* but was quickly able to dispose of this question because the decree in Illinois did not pass upon the question as to whether the Will was still a valid Will in Iowa even though according to the Statute of Illinois it had been revoked.

The Iowa Court then gave due consideration to the question of whether its obligation to give full faith and credit to the decision of the Illinois Supreme Court constrained it to hold that the Will could not be used to pass title to real estate in the State of Iowa. It found not only that the Illinois Supreme Court made no such decision on this question and confined itself to the effect of the document in Illinois, but also learned that the Appellate Court for the Second District of Illinois which was the Court of last resort on the type of question before it, held in effect that it would indeed be proper to present the Will for probate in the State of Iowa. While this decision did not go so far as to require the District Court of Iowa to admit the Will to probate, and such a holding would have been beyond the jurisdiction of the Illinois Court, it was a decision by an Illinois Court by which it would appear that the District Court of Iowa was free to consider whether under the laws of Iowa, the Will had been revoked. It showed the effect given to the Illinois decision by the law of Illinois. Another state could give it no stronger effect.

Up to this point, there was apparently no disagreement in the Supreme Court of the State of Iowa. The majority opinion held that the Will could not be revoked under the Iowa Code in the manner in which it was held to have been revoked under the Illinois Code. The minority opinion attempted to construe the Iowa Statute by reading into it an alleged intention of the Iowa Legislature to adopt the methods of revocation in force in the States of domicile of decedents. The members of the Court were unable to agree upon the proper construction of the Iowa Code but the majority has spoken in its opinion. As the majority opinion was that the Will was not revoked according to the law of Iowa, and that the Illinois Courts had no jurisdiction of and did not attempt to pass upon the question as to whether the Will had been revoked by the law of Iowa, it applied its

construction of the law of Iowa to the application to probate the Barrie Will just as it would any other Will of a non-resident dying with a title to real estate in Iowa in the same manner as if the Will had never been denied probate in the State of domicile of the testator and ordered that the Will be admitted to probate.

To review this decision of the Court of last resort of the State of Iowa would be to depart from all precedents of this Court with the effect of unforeseeable confusion in the future both as regards the Full Faith and Credit Clause of the Constitution of the United States and the construction of State Statutes.

Respectfully submitted,

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